

Appeal No. 03-1086

Cir. Ct. No. 00CV003042

**WISCONSIN COURT OF APPEALS
DISTRICT I**

**GENE L. OLSTAD, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,**

PLAINTIFF-APPELLANT,

v.

**MICROSOFT CORPORATION, A FOREIGN CORPORATION,
AND DOES 1 THROUGH 100, INCLUSIVE,**

DEFENDANTS-RESPONDENTS.

**FILED
FEB 17, 2004**

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Wedemeyer, P.J., Schudson and Curley, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2001-02)¹, this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE: Does Wisconsin's antitrust act, WIS. STAT. § 133.03, apply to interstate commerce affecting Wisconsin commerce?

Gene L. Olstad, individually and on behalf of other Wisconsin consumers of computer products manufactured and distributed by Microsoft

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Corporation, appeals from the order granting summary judgment and dismissing their class action suit against Microsoft. Olstad argues that the circuit court failed to recognize that the purchases of Microsoft products in Wisconsin are intrastate transactions, and erred in concluding that, under *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N.W. 1058 (1914), WIS. STAT. § 133.03 applies only to intrastate commerce.

In 2000, Olstad sued Microsoft claiming that it violated WIS. STAT. § 133.03, which, in relevant part, provides:

Unlawful contracts; conspiracies. (1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal....

(2) Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce is guilty of a Class H felony

(3) As an alternative to the criminal penalties for violation of this section, the department of justice or district attorney may bring an action for a civil forfeiture....²

(Footnote added.) Olstad alleged that Microsoft, through nationwide anti-competitive conduct, unlawfully maintained monopolies, enabling it to overcharge Wisconsin consumers for various operating systems and software. Microsoft moved for summary judgment, arguing that Wisconsin's antitrust act did not apply

² Although neither the Wisconsin Department of Justice nor any district attorney is a party to the underlying action, we acknowledge the nonparty brief filed by the Wisconsin Department of Justice and, by virtue of the alternative provided by WIS. STAT. § 133.03(3), the Department's obvious interest in the issue in this appeal.

to out-of-state conduct primarily affecting interstate commerce. The circuit court agreed.³

In their respective briefs to this court, Olstad and the Wisconsin Department of Justice argue that the plain language of WIS. STAT. § 133.03(1)—referring to *every* contract or conspiracy in restraint of trade or commerce—allows for antitrust actions beyond those involving only intrastate commerce. They contend that: (1) even assuming *Pulp Wood* applies, it does not limit the statute’s scope as Microsoft claims; and (2) addressing the predecessor antitrust statute, *Pulp Wood* does not account for the revised antitrust statute, enacted in 1980, and the extent to which it broadened antitrust authority.

Olstad and the Wisconsin Department of Justice also contend that, even before 1980, the supreme court, in two cases, applied the predecessor statute in ways significantly undermining what otherwise might be viewed as the *Pulp Wood* limitation of the antitrust statute to intrastate commerce. *See State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966); *State v. Allied Chem. & Dye Corp.*, 9 Wis. 2d 290, 101 N.W.2d 133 (1960). Finally, they emphasize that, in *Emergency One, Inc. v. Waterous Co.*, 23 F. Supp. 2d 959 (E.D. Wis. 1998), the federal court analyzed this very issue and concluded that, in some circumstances, Wisconsin’s antitrust statute can reach interstate commerce affecting Wisconsin consumers. *Id.* at 965.

³ Microsoft also argued that because Olstad, in his deposition, testified, “I don’t think I was overcharged,” he suffered no injury and, therefore, that summary judgment was required. The circuit court agreed and also granted summary judgment on this basis. On appeal, however, neither party addresses this aspect of the court’s decision.

Olstad also alleged fraudulent advertising in violation of WIS. STAT. § 100.18(1); on appeal, however, he does not challenge the dismissal of that claim.

In support of the circuit court's conclusion, Microsoft counters that *Pulp Wood*'s declaration that Wisconsin's antitrust act "applies to attempts to monopolize trade and commerce *within the state*" controls. See *Pulp Wood*, 157 Wis. at 625 (emphasis added). Moreover, Microsoft maintains that any possible doubt was erased by the supreme court's recent comment confirming the limitation of the antitrust statute to intrastate commerce. See *Conley Publ'g Group Ltd. v. Journal Communications, Inc.*, 2003 WI 119, ¶16, 265 Wis. 2d 128, 665 N.W.2d 879 ("The dearth of state antitrust precedent is not surprising because the scope of Chapter 133 is limited to intrastate transactions.").

Olstad and Microsoft have presented a fair debate, rendering a legal dilemma. The cases each party cites do indeed support their respective positions without any authority clearly resolving their dispute. Moreover, the parties' arguments to this court strongly suggest that the determination of whether Wisconsin's antitrust statute applies to interstate commerce affecting intrastate commerce is an issue requiring careful analysis of public policy as well as law.⁴ Accordingly, we conclude that this case is appropriate for certification to the Wisconsin Supreme Court.

⁴ Additionally, if WIS. STAT. § 133.03 encompasses interstate commerce, the parameters will need to be defined in terms implicating related policy considerations. In its brief to this court, for example, the Wisconsin Department of Justice, drawing from 15 U.S.C. § 6a(1)(A) (2000), has recommended adoption of a precise standard: "that the Wisconsin antitrust statute applies to conduct occurring in interstate commerce, so long as that conduct has a 'direct, substantial and reasonably foreseeable effect' on commerce within Wisconsin." (Quoted source omitted.)

